

**SUPERFUND LAW AND THE ROLE OF STATES AFFECTED BY US
DEPARTMENT OF ENERGY FACILITIES OUTSIDE THEIR BORDERS**

**By Michael W. Grainey
Assistant Director
Oregon Office of Energy**

**2001 EPA National Site Assessment Conference
Portland, Oregon
May 22, 2001**

SUPERFUND LAW AND THE ROLE OF STATES AFFECTED BY US DEPARTMENT OF ENERGY FACILITIES OUTSIDE THEIR BORDERS

By Michael W. Grainey
Assistant Director, Oregon Office of Energy

SUMMARY

A U.S. Department of Energy (USDOE) nuclear site subject to Superfund law can have impacts beyond the border of the state where the site is located. The U.S. Department of Energy's Hanford Nuclear Site in the State of Washington affects Oregon as well as Washington. Current federal law does not recognize this reality. Federal law should be changed; Oregon should have a role in decisions made on the safe handling, management and disposal of wastes at Hanford. States impacted by USDOE facilities located in neighboring states should be given a role in those facilities. In the meantime, using current law creatively, federal agencies should look for ways to more fully involve neighboring states affected by USDOE facilities in decisions made regarding those sites.

THE IMPACT OF HANFORD ON OREGON

The U.S. Department of Energy's Hanford Nuclear Site in the State of Washington has a significant impact on the State of Oregon. Hanford is one of the most contaminated sites in the United States, if not on the entire planet.

The Hanford Nuclear Site is 560 square miles in size and contains more than one million cubic yards of radioactive waste. More than 1,300 sites at Hanford are contaminated with radioactive waste, chemically hazardous waste or a mixed waste combination of radioactive and chemically hazardous wastes. Fifty-three million gallons of high level radioactive waste alone are in 177 large, aging underground storage tanks. These wastes would cover an entire football field fifty yards high. These tanks have leaked more than a million gallons of waste into the soil and nearby groundwater. An additional 2,300 tons of highly radioactive reactor spent fuel are in the deteriorating K-Basins, which are only a quarter of a mile from the Columbia River.

Hanford's location on the Columbia River causes special concern to Oregon. The Columbia River is a border shared by the states of Oregon and Washington for nearly 300 miles downstream from Hanford. Radioactive waste at Hanford presents a grave potential threat to the Columbia River.

While Hanford is located in the State of Washington, the preservation of the quality of the Columbia River is absolutely critical to the well-being of Oregonians as well as Washingtonians. Nearly one million Oregonians live downriver from Hanford. Oregonians rely on the Columbia River for commerce, for recreation, for fisheries, for irrigation, for energy production and for transportation.

Thousands of Oregonians live within fifty miles of Hanford. In fact, Oregon's northern border is less than thirty-five miles from Hanford. The fifty-mile radius is the emergency planning radius for nuclear facilities under federal law. The cities of Hermiston, Boardman, Umatilla and the Umatilla Indian Reservation are located within this fifty mile radius and could be at immediate risk in the event of a

major accident at Hanford. Portions of the two Oregon counties located in this fifty mile radius, Umatilla County and Morrow County, also include important agricultural, fishing and other natural resource areas vital to the economy of the entire State of Oregon. An accident at Hanford which impacts the fifty-mile nuclear emergency planning radius would seriously harm Oregon agriculture, fisheries and other natural resources.

Moreover, one of Oregon's federally recognized Indian nations, the Confederated Tribes of the Umatilla Indian Reservation, has treaty rights for fishing and for other activities which have been adversely affected by federal actions at Hanford. In addition, the Columbia River, Oregon highways and Oregon railroad routes are used as the major shipping corridors for radioactive materials sent into and out of the Hanford Reservation. Virtually all shipments into or out of Hanford travel through Oregon for over 200 miles.

There is strong historic basis for the interest of Oregonians in Hanford. The notorious "Green Run" in 1949, in which radioactive iodine was deliberately released into the atmosphere at Hanford, resulted in iodine contamination throughout major portions of Oregon, as well as parts of Idaho and Washington. Contamination in Oregon was found from the northern portions of the State near Hanford to as far south as Klamath Falls near the California border.

In spite of the serious impact Hanford could have on Oregon, the Superfund compliance agreement which governs the cleanup of Hanford known as the Hanford Tri-Party Agreement, does not include Oregon as a party. That agreement currently includes only the U.S. Department of Energy, the U.S. Environmental Protection Agency and the State of Washington.

Current federal Superfund law does not explicitly provide Oregon the right to be a party to the Hanford Agreement in spite of Oregon's strong interests in Hanford. Because of the lack of recognition under current federal law, Oregon does not receive all the information about waste storage and disposal problems provided to the three parties. Moreover Oregon's participation in meetings important to the cleanup effort is limited or, in some cases, denied entirely, such as meetings to reset deadlines in the Hanford Tri-Party Agreement, and meetings relating to implementation and enforcement of that Agreement.

There is widespread concern in Oregon about Hanford. There is also a strong desire by Oregonians to have a direct role in decisions made at Hanford. An indication of the depth of concern of Oregonians about Hanford is House Joint Memorial 5, which recently passed the Oregon Legislature by a unanimous vote of both the Oregon House and the Oregon Senate. That resolution asks Congress to change federal law to guarantee Oregon the ability to participate in decisions on cleanup of radioactive waste at Hanford. That resolution also urges Congress to fully fund the effort to clean up these wastes. Similar resolutions have been passed by previous sessions of the Oregon Legislature as well.

While Oregon participates in a number of federally-sponsored working groups, including the National Governors' Association Nuclear and Mixed-Waste Task Force, US Department of Energy's State and Tribal Government Working Group, the Hanford Advisory Board, and other groups, all of these committees are advisory in nature. In spite of Oregon's compelling interest in Hanford, and in spite of the potentially severe consequences of an accident at Hanford, Oregon has no role in making the decisions which affect the risk which the Hanford site presents to Oregon.

PRECEDENTS FOR A REGIONAL APPROACH TO ENVIRONMENTAL ISSUES

Congress has successfully employed a regional approach to complex environmental issues before, including those involving radioactive waste and energy issues. The following examples demonstrate that regional approaches can be utilized effectively when dealing with issues which affect more than one state.

For example, the Low-Level Radioactive Waste Policy Act of 1980 established a process by which low-level radioactive waste is disposed of by the states working together voluntarily through regional compacts. While some regions have been slow to form compacts or to agree on disposal sites, in the Pacific Northwest the concept has worked very well. The low-level radioactive waste disposal facility for the Pacific Northwest States (and for the Rocky Mountain Compact States) is located in the State of Washington. The region's disposal site for non-radioactive hazardous materials is located in Oregon.

Another example of a regional approach is the Northwest Power Act, which established the Northwest Power Planning Council in 1980. The Council is composed of two members of each of the states of Oregon, Washington, Idaho and Montana and provides guidance to the Bonneville Power Administration (BPA) on energy and fisheries issues. Each of the four states has equal representation on the Council, even though BPA is headquartered in Oregon and over 75% of its sales and customers are in Oregon and Washington. Nevertheless, Congress recognized that BPA can have an impact on other states in the region sufficient to provide them with a meaningful role in BPA's activities.

River basin commissions which Congress has established provide other examples of power-sharing among multiple state and federal agencies.

The State of Oregon recognizes the role that nuclear waste disposal facilities located in its own state can have on neighboring states. Oregon's Administrative Rules (OAR) governing the siting of a nuclear waste disposal facility provide the following:

Adjacent State Compatibility. OAR 345-50-090. In order to issue a site certificate for a waste disposal facility, the Council must find that the disposal of such wastes, and the amount thereof, at the site will be coordinated with the regulatory programs of adjacent states for disposal of such wastes. Coordination with the regulatory programs of adjacent states means that radioactive emissions from waste disposal facilities on or near Oregon boundaries will not violate regulatory limits of the adjacent states.

PROPOSAL FOR AN EQUITABLE SOLUTION

The Superfund law, otherwise known as the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), is the primary federal law governing much of the waste at Hanford and at other US Department of Energy facilities. It currently limits state participation in review and oversight of federal decisionmaking to the state within which the federal facility is located. The Superfund law should be amended to provide a meaningful role for a state like Oregon, impacted by a US Department of Energy facility in another state,

Congress began work on the Superfund reauthorization bill in 1994 and has been working on it ever since. Congress may again consider the Superfund reauthorization bill this year. Since unlike most federal environmental laws, federal authority under Superfund is not delegable to the states, section 121(f) of Superfund defines state involvement in remedial actions conducted pursuant to Superfund. Section 121(f) provides a state in which a Superfund site is located with substantial and meaningful involvement in the initiation, development, and selection of remedial actions undertaken at the federal facility.

While Congress has been considering reauthorization of Superfund, we have urged Congress to amend the Superfund law to recognize Oregon's interest in Hanford and to give Oregon a meaningful role in decisions made at Hanford. Congressional committees have been responsive to Oregon's request. Various Congressional committees have passed versions of Superfund reauthorization bills in the years since 1994 which provide rights for states near USDOE facilities in other states. These bills have provided that various provisions of the state involvement role of section 121(f) of CERCLA apply equally to Oregon and to any other state similarly affected by a US Department of Energy facility.

For example, section 205 of H.R. 3800 as passed by the House Public Works and Transportation Committee in 1994 provided that a state within a fifty mile radius of a federal facility has the same rights under section 121(f)(1)(E) as the state where the facility is located. That section provided, among other things, the state with the right to review and comment on the remedial investigation and feasibility study (RI/FS) required under CERCLA and all technical documents leading to its issuance, to review and comment on the planned remedy identified in the RI/FS, to review and comment on the engineering design following selection of the final remedial action and to review and comment on other technical data and reports relating to implementation of the remedy.

In 1995, Section 102 of H.R. 2500 as passed by the House Commerce Subcommittee on Commerce, Trade & Hazardous materials included the same "review and comment" provisions of the 1994 House Superfund bill for states within fifty miles of US Department of Energy facilities and also provides additional rights to these states. For example, Section 102 of H.R. 2500 provided that the neighboring state and the state where a USDOE facility are located may enter into a Memorandum of Understanding on issues of mutual concern regarding response actions at the facility. That bill also provided the neighboring state with the ability to intervene as a matter of right in any enforcement action brought by the state where the USDOE facility is located. Finally, the neighboring state would have the same right as the host state to notice of negotiations with potentially responsible parties, to participate in such negotiations and to be a party to any settlement.

In 1999 section 401 of H.R. 1300 passed by the House Transportation Committee provided to a state within 50 miles of a US Department of Energy facility all of the same rights under section 121(f) as those enjoyed by the state where the facility is located, including those contained in H.R. 3800 in 1994 and H.R. 2500 in 1995.

However, because Congress has not passed a Superfund reauthorization bill to date, the Oregon Congressional delegation's recent approach has been to introduce legislation which focuses exclusively on Hanford. For example, in the last Congress Oregon's House members introduced H.R. 2052. That bill, sponsored by all of Oregon's House members, would give Oregon the same rights at Hanford that Washington has under federal law, including party status in the Hanford Tri-Party Agreement. If

Congress fails to move on Superfund reform, it is likely that Oregon's members will reintroduce a bill similar to H.R. 2052.

In the meantime, federal agencies should undertake measures within existing law to more fully involve Oregon and other states impacted by US Department of Energy nuclear facilities. In the case of Hanford Oregon should be allowed to participate in Hanford Tri-Party Agreement negotiations, but not vote or be a decisionmaker in those negotiations. This would give Oregon the ability to influence the three parties on proposed revisions to the Agreement while those negotiations are underway.

Under existing law Oregon staff should also be allowed to participate in the same manner in other meetings by the three parties, such as to review the implementation, potential revisions and enforcement of the Hanford Tri-Party Agreement. Oregon should receive the same materials simultaneously provided to the parties prior to the meetings.

Oregon is willing to agree to abide by any confidentiality requirements set by the three parties and to abide by scheduling and timing requirements set by the parties. Such conditions would assure that Oregon's increased participation would not unduly complicate or delay the implementation of remedial actions at Hanford.

CONCLUSION

States which could be impacted by a federal nuclear facility should have a role in the decisionmaking at those facilities. The proposed changes in Superfund proposed above provide a workable approach which maintain the role of the US Department of Energy as the responsible federal agency, and maintain the roles of the state where the US Department of Energy site is located and the US Environmental Protection Agency as the primary regulators. However, they also provide the neighboring state with a role that is meaningful in representing its potentially affected citizens.

Congress should act favorably on these proposals to provide neighboring states with a meaningful role at US Department of Energy sites. In the meantime, the federal agencies should undertake measures within existing law to more fully involve states like Oregon affected by US Department of Energy sites in neighboring states.

Radioactive contamination does not respect political boundaries; those boundaries should not be the basis for excluding a state from a role in decisions which can directly affect its citizens. States which share the risk presented by US Department of Energy facilities should share in the ability to affect the decisions made pursuant to Superfund at those facilities.